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No. 08-1245

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

NATIONAL TAXPAYERS UNION,

Petitioner,

v.

UNITED STATES SOCIAL SECURITY
ADMINISTRATION, OFFICE OF THE
INSPECTOR GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

May the Third and Fourth Circuits overrule the holding of *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600 (2003) ("*Telemarketing Associates*") that the First Amendment allows punishment of charitable solicitation *only* for actual fraud?

REASONS FOR GRANTING THE PETITION

1. In Accordance with this Court's Decisions in *Schaumburg* and *Telemarketing*, the First Amendment Allows Punishment of Charitable Solicitation Only for Actual Fraud

According to the Social Security Administration, NTU's argument that this Court's First Amendment decisions in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600 (2003), allow punishment of charitable solicitation only for actual fraud, and that the court of appeals' decision conflicts with this Court's decisions, is "meritless." Brief in Opposition at 11.

The Social Security Administration's position, interestingly enough, supports the grant of the petition for writ of certiorari in this case.

The Social Security Administration joins issue with NTU regarding whether actual fraud is a *sine qua non* for punishing charitable solicitation under *Schaumburg* and *Telemarketing Associates*. Although the Social Security Administration is mistaken when it states that the foregoing cases from this Court do not "suggest that the government can regulate a non-profit organization only by prohibiting actual fraud," Brief in Opposition at 12, both parties agree that this case squarely presents the important constitutional issue as to whether the government can punish charitable solicitation on less than a showing of actual fraud. It is undisputed that the court of appeals has punished NTU's charitable

solicitation on far less than a showing of actual fraud. The Social Security Administration argues that it can punish charitable organizations on less than a showing of actual fraud, contrary to this Court's decisions in *Schaumburg* and *Telemarketing Associates*. This is an important issue regarding the First Amendment and deserves this Court's consideration.

2. The Social Security Administration's Fact Findings from the Administrative Hearing are Flawed in Accordance with this Court's Jurisprudence

The Social Security Administration states that NTU does "not contest these findings, which demonstrate beyond doubt that the government has an overriding interest in preventing the harm arising from petitioner's deceptive mailings." Brief in Opposition at 10. This is not correct.

NTU pointed out to the court of appeals that it had an "obligation independently to examine the whole record to ensure 'that the judgment does not constitute a forbidden intrusion on the field of free expression,'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984),¹ and the court of appeals ignored its obligation. The court of appeals also ignored the argument NTU raised that, because the ALJ who made the findings of fact (and announced that "SSA is correct that I have no authority to review constitutional issues."²) was an executive branch employee, the entire administrative proceeding was tainted by violation of Article III's

1. NTU 3rd Circuit Br. at 16.

2. *Id.* at 31, n. 9; quote in court of appeals appendix at A91.

separation of powers requirement.³ The court of appeals also ignored NTU's argument that, because the legislative intent was wholly deterrent, the penalty proceeding was punitive under *United States v. Halper*, 490 U.S. 435 (1989) and could not occur before an administrative agency.⁴

Therefore, any suggestion that those factual findings somehow relate to a proper analysis in accordance with this Court's First Amendment jurisprudence is a fiction of the highest and grossest degree.

3. *Id.* at 35-6, relying on *Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1259 (11th Cir. 2003) and *Noriega-Perez v. United States*, 179 F.3d 1166, 1175 (majority), 1184 (Judge Ferguson dissent) (9th Cir. 1999), interpreting *Northern Pipeline v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

4. NTU 3rd Circuit Br. at 27-33. Because the court of appeals ignored NTU's arguments and wrote an unpublished opinion addressing miscast arguments, NTU concluded it could not responsibly present these process issues here in its petition for a writ of certiorari.

CONCLUSION

The Court is requested to grant the writ of certiorari.

Respectfully submitted,

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